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July 17, 2002

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Dear Chairman Powell:

Thank you for your additional letter of July 15, 2002, regarding the Commission's approach to consumer protection in the face of telecommunications bankruptcies. I take this opportunity to correct certain apparent misunderstandings regarding the Commission's authority and to comment further upon the Commission's approach to these issues.

First, your response highlights yet again the policy inconsistency to which my press statement alluded; namely, that although you believe the Commission has authority to address consumer protection interests as contained in Section 214 of the Communications Act with respect to a possible WorldCom bankruptcy, and in the case of last year's Northpoint Communications bankruptcy, you did not believe this to be the case when Excite@Home went bankrupt. I appreciate the fact that you wrote the bankruptcy judge at the time suggesting that the court provide protection to consumers. Such correspondence to the court, however, is no substitute for the inherent ability of the FCC to act on its own.

I had noted in my statement that, for consumers, the service received from Northpoint and the service from Excite@Home, were essentially the same service, although one is offered over telephone wires and the other, by cable operators over cable facilities. Consumers utilized both services to obtain broadband access to the Internet.

You asserted in your correspondence to me that Excite@Home was merely an Internet Service Provider (ISP) -- "akin to AOL, Earthlink, and Juno" -- and was not a carrier. Because it was not a carrier, you stipulate that it is not covered by the provisions of law giving authority to the FCC to step in, if necessary, to ensure continuity of service.

I believe this mischaracterizes the Excite@Home service that consumers received. As you may recall, at the time the cable industry offered consumers Excite@Home as

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part of an exclusive, bundled service. A subscriber received both the unregulated, ISP service and the broadband transport to reach that service jointly.

When Excite@Home went bankrupt it had roughly 4 million customers. Subsequent to service shut-offs, the vast majority of consumers were irate not because they could no longer obtain the particular ISP "Excite@Home," but rather, because its collapse brought to an abrupt halt their *broadband access to the Internet through any other ISP*.

Even if one were to contend that Excite@Home was solely an ISP, i.e., divorced from any transport carriage, it is clear that such carriage had to have been provided to consumers by some entity – in this case, it was Excite@Home's owners: several very large cable MSOs. I believe these "owner-carriers" surely must answer to the FCC's Section 214 authority for the broadband access to ISPs they provide to cable consumers. In fact, your letter notes that "with respect to a carrier, it is not clear that section 214 could not be applied to any service offered by that carrier."

You chose not to assert this point with either Excite@Home or its cable industry owners at the time and it is now too late for those affected by the Excite@Home shut-offs anyway. In the future, I hope you will be less reluctant to assert, on behalf of consumer interests, any and all FCC authority to prevent abrupt service disruptions.

Second, your response of July 15, 2002, underscores starkly the key point I raised last week. Pending proposals before the Commission will render the risk to consumers greater in the event of bankruptcies if the Commission re-defines or re-classifies the DSL-based carriers, which today are covered by Section 214, so that they are treated as cable modem-based carriers, which the Commission *de facto* considers not covered by Section 214 and other provisions of Title II. If it endorses such proposals, the Commission will have re-defined itself out of authority to invoke the consumer protection provisions of Section 214, not only in the case of cable modem-based services such as Excite@Home, but also with respect to DSL-based services. Millions of additional consumers would be left unprotected from bankruptcy-induced shut-offs.

Third, your letter further notes that Section 214 was written in 1934, when there were no classes of carriers or services. As you know, Congress has amended the Communications Act numerous times since 1934. Most significantly, in 1996, Congress specifically re-oriented national telecommunications policy to encourage competitive entry by other carriers, which we hoped, would innovate and offer consumers an array of services. In other words, Congress not only knew there were other classes of carriers and services, but was actively changing the law to endorse such a telecommunications future. Congress had an opportunity at that time to also limit the scope of Section 214 so that it

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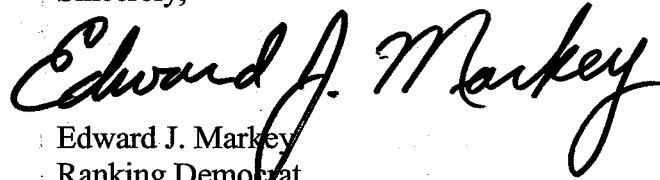
would not cover new carriers or new classes of services. It did not enact any such limitations.

You have invited me and my colleagues to enact legislation to "extend the Commission's authority to impose discontinuance requirements on other carriers and services within our jurisdiction." Given the broad scope of Section 214, I believe it is clear that we do not need to do so.

The Commission has all the authority it needs under Section 214 to protect consumers in the event of bankruptcies. The only limitation on such authority to address service quality and service disruptions from carriers will be limitations that the Commission places upon itself. Again, I urge you and your fellow Commissioners to re-think the wisdom of many of the proposals you have pending before you with respect to broadband policy. Many such proposals fundamentally depart from the statutory structure upon which the Congress built the Telecommunications Act of 1996, and this correspondence has illuminated but one policy pitfall.

I respectfully request that you submit my letters to you, as well as your responses back to me, as part of the formal proceeding before the Commission, *In the matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (CC Docket No. 02-33). I look forward to continuing to work with you and your fellow Commission members on these and other matters in the future.

Sincerely,

A handwritten signature in black ink that reads "Edward J. Markey". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Edward J. Markey  
Ranking Democrat  
House Subcommittee on Telecommunications  
and the Internet